IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2005-0428
Appellee,	)	DEPARTMENT A
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
ROBERT MICHAEL JOLLY,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20042230

Honorable Kenneth Lee, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Diane Leigh Hunt — Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Robb P. Holmes — Tucson
Attorneys for Appellant

V Á S Q U E Z, Judge.

¶1 Following a jury trial, Robert Michael Jolly was convicted of aggravated driving under the influence of an intoxicant (DUI) and aggravated driving with an alcohol concentration of 0.08 or more, both while his license was suspended, revoked, or in violation of a restriction. The trial court sentenced him to concurrent, presumptive prison terms of twelve years. On appeal, Jolly asserts his due process right to gather exculpatory evidence under the United States and Arizona Constitutions was violated when the arresting officer did not honor his request for an independent blood draw, and the trial court improperly instructed the jury it could consider his refusal to take field sobriety tests as evidence. For the following reasons, we affirm.

Facts and Procedural History

¶2 The following facts are not disputed. On June 7, 2004, Tucson Police Officer Barrett observed a car making a wide right turn into the left eastbound lane of Grant Road. The car turned in front of oncoming traffic and forced at least one other driver to "slam on [the] brakes." Officer Barrett followed the car for at least a mile, noticing that it drifted into and out of other lanes as it traveled. Barrett initiated a traffic stop, and the car, which had drifted into the left turn lane, drifted back to the middle lane and pulled over on the south side of the street. Although the driver had no identification with him at the time of the stop, he was eventually identified as Jolly. During the stop, Barrett noticed that Jolly had watery, bloodshot eyes, his face was flushed, his speech was slurred, and his breath had a strong odor of intoxicants.

¶3 Jolly was unable to walk in a straight line when Barrett asked him to step out of his car and walk toward the police car. Barrett then administered the horizontal gaze nystagmus test and observed six cues of impairment. When Barrett asked Jolly to perform the standard field sobriety tests, Jolly responded by asking for "a ticket" instead and accused Barrett of "just trying to bust [him] for DUI." Barrett read Jolly the *Miranda* warnings,[1] and, after questioning him briefly, placed him under arrest.

¶4 Barrett then informed Jolly of the consequences of refusing to consent to a breath or blood test. Jolly did not respond when Barrett asked if he would consent to a test. He also did not respond to Barrett's final admonition that he was not entitled to further delay. Barrett interpreted this as Jolly's refusal and arranged for him to be transported to Kino Hospital so that a sample of his blood could be obtained. At the hospital, Barrett secured a telephonic search warrant to obtain a sample of Jolly's blood. After his blood was drawn, Barrett informed Jolly of his right to an independent blood test. Jolly requested an independent test and stated he wanted "to go to" Tucson Medical Center.[2] But because Jolly had complained of other medical problems, he was temporarily admitted to Kino Hospital. After he was discharged, Jolly was taken to the police station, without receiving an independent blood draw, and booked into jail.

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[1]*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).

[2]Kino Hospital apparently does not perform independent blood draws.

DISCUSSION

Independent Blood Test

¶5 Jolly first claims he was denied due process of law and a fair trial when the state interfered with his right to gather exculpatory evidence. He asserts Barrett did not honor his request for an independent blood draw by taking him to get one at Tucson Medical Center prior to being booked into jail. Because Jolly did not raise this claim below he has forfeited all but fundamental, prejudicial error review. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial. *Id*., *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). The burden is on a defendant to establish the error is both fundamental and prejudicial. *Id.* ¶¶ 20, 22.

¶6 Under A.R.S. 28-1388(C), a DUI suspect has a right to obtain an independent blood test. But the state contends Barrett's failure to take Jolly for the independent blood draw was not error because a second vial of Jolly's blood from the state's draw had been preserved for his use, and Jolly could have tested that sample. This very argument was rejected in *State v. Olcan*, 204 Ariz. 181, 61 P.3d 475 (App. 2003). There, Division One of this court found that, based on § 28-1388(C), a DUI suspect is entitled to a "reasonable opportunity to arrange for a competent person to draw an independent sample of the defendant's blood and analyze that sample regardless whether the State has collected,

analyzed, and preserved a portion of the defendant's blood." *Id.* ¶ 11. The state does not suggest Division One's interpretation of § 28-1388(C) is incorrect, nor do we believe that it is. "[I]f a defendant affirmatively requests a separate blood sample for independent testing, law enforcement officials may not interfere with his efforts to obtain such a sample." *State v. Kemp*, 168 Ariz. 334, 337 n.4, 813 P.2d 315, 318 n.4 (1991). The state, therefore, did not satisfy Jolly's right to an independent sample by merely preserving a sample for him from the state's draw.

¶7 As it did in *Olcan*, the state maintains it did not interfere with Jolly's ability to obtain an independent test. A defendant's right to obtain an independent test is not violated if the difficulties in obtaining the test were not created by the state. 204 Ariz. 181, ¶ 14, 61 P.3d at 478. Error only occurs when law enforcement "unreasonably interfere[s]" with a suspect's attempts to obtain his own test. *See Mack v. Cruikshank*, 196 Ariz. 541, ¶ 15, 2 P.3d 100, 105 (App. 1999); *see also State v. Sanchez*, 192 Ariz. 454, ¶ 19, 967 P.2d 129, 132 (App. 1998); *Amos v. Bowen*, 143 Ariz. 324, 328, 693 P.2d 979, 983 (App. 1984). And it is Jolly's burden to prove his failure to obtain an independent blood test was the result of unreasonable police interference. *Henderson*, 210 Ariz. 561, ¶ 22, 115 P.3d at 608. On the record available to us, we do not believe he has met this burden.

¶8 Officer Barrett stopped Jolly at 10:52 p.m. At 12:42 a.m., Jolly's blood was drawn at Kino Hospital. While at the hospital, Jolly experienced unrelated medical issues,

and, at his request, underwent medical testing and treatment to address those issues. When he was later released from Kino Hospital, police apparently took him directly to jail.

¶9 Jolly argues that Barrett's failure to take him to another hospital for an independent blood draw constitutes unreasonable interference. Relying primarily on *Amos*, he argues he was "in custody and unable to proceed to a hospital on his own[, and] the officers . . . made no effort to transport [him] to another hospital to obtain an independent test . . . [or] provide him a telephone or any other means by which he could have made arrangements for the test." But, we find the present case distinguishable from *Amos*.

¶10 In *Amos*, the defendant requested an independent blood draw and an officer agreed to take him to a hospital to obtain it. 143 Ariz. at 327, 693 P.2d at 982. En route to the hospital, the officer stopped to assist with an assault in progress and was delayed two hours. *Id.* The defendant was never taken for the independent blood draw and, following the delay, decided he no longer wanted one. *Id.* In determining whether the delay constituted unreasonable interference, this court applied the "fair chance" standard, which requires that a defendant be "'afforded a fair chance to obtain independent evidence of sobriety essential to his defense at the only time when it [is] available.'" *Id.* at 328, 693 P.2d at 983, *quoting Smith v. Ganske*, 114 Ariz. 515, 517, 562 P.2d 395, 397 (App. 1977). We concluded that the delay, though proper, constituted "affirmative conduct of the police [that] clearly violated [the defendant's] right to obtain exculpatory evidence." *Id.*

¶11 *Amos* is simply inapposite here. Generally, "'[p]olice officers are not required to take the initiative or even to assist in procuring any evidence on behalf of a defendant.'" *Smith v. Cada*, 114 Ariz. 510, 512, 562 P.2d 390, 392 (App. 1977), *quoting In re Martin*, 374 P.2d 801, 803 (Cal. 1962). In *Amos*, although the officer had no duty to assist the defendant initially, he "undertook . . . to transport" him to obtain the blood draw and then did not follow through. 143 Ariz. at 327, 693 P.2d at 982. This voluntary undertaking gave rise to the officer's responsibility to then ensure that the defendant was transported to the hospital to obtain his independent blood draw. *Id*. at 328, 693 P.2d at 983. The record in this case contains no evidence that Barrett had agreed to take Jolly to another hospital to obtain an independent blood sample. The voluntary undertaking present in *Amos* simply does not exist here.

¶12 And the fact that police took Jolly directly to jail from Kino Hospital without taking him to another hospital is not, standing alone, evidence that the officer had interfered unreasonably with Jolly's efforts to obtain an independent blood draw for testing. Prior cases have held that unreasonable interference does not occur merely because the suspect is detained in jail for the critical period. *See Van Herreweghe v. Burke*, 201 Ariz. 387, ¶¶ 6-7, 11, 36 P.3d 65, 67, 68 (App. 2001) (immediate release from custody not required to satisfy defendant's statutory and constitutional right to gather exculpatory evidence); *State v. Bolan*, 187 Ariz. 159, 161, 927 P.2d 819, 821 (App. 1996) (practical difficulties of submitting to independent test not violative of due process).

¶13 The conduct of law enforcement in this case does not approach the type of conduct found in previous decisions to constitute an unreasonable interference with the defendant's right to an independent blood draw. *See, e.g.*, *McNutt v. Superior Court*, 133 Ariz. 7, 9, 648 P.2d 122, 124 (1982) (refusing to allow defendant to contact an attorney to arrange for an independent test); *Cada*, 114 Ariz. at 514, 562 P.2d at 394 (ignoring defendant's request to post bail knowing he had sufficient funds to do so); *Ganske*, 114 Ariz. at 517, 562 P.2d at 397 (informing person who arranged to post defendant's bail that defendant was no longer in custody and later delaying accepting bail money).

¶14 Although Jolly asserts that he was prevented from arranging a test, he does not direct us to any part of the record supporting that assertion, nor have we found any. There is no evidence that Jolly requested to contact an attorney, attempted to post bail, or tried to make arrangements to have a qualified person come to the jail to conduct an independent draw. Therefore, Jolly has not sustained his burden of proving the state unreasonably interfered with his right to obtain an independent blood draw; he has not established any error occurred here, let alone fundamental error. *See Henderson*, 210 Ariz. 561, ¶ 22, 115 P.3d at 608. And having determined that no error occurred, we do not consider Jolly's argument that he was prejudiced by the lack of an independent blood test. *See id.* ¶ 20.

Field Sobriety Test Jury Instruction

¶15 Jolly next argues the trial court committed reversible error when it instructed the jury that it may consider as evidence of Jolly's guilt the fact that he refused to submit to

field sobriety tests. He argues submission to field sobriety tests is voluntary, and the jury may not be permitted to infer guilt from a refusal to comply. Because Jolly failed to object to the instruction below, we review it for fundamental error only. *See id.* ¶ 19; *cf. State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991) (failure to request jury instruction in trial court waives all but fundamental error).

¶16 At trial, the court instructed the jury that if it found "the defendant refused to submit to [field sobriety] tests, [it] may consider such evidence together with all the other evidence." Jolly argues that this instruction misstated the law and constituted an improper judicial comment on the evidence. He contends the court's instruction "unduly emphasized the possibility that consciousness of guilt could be inferred from a refusal to submit to voluntary tests [and] therefore . . . suggested that the trial judge believed that such an inference was proper." We disagree. Jolly fails to recognize that such an inference is permissible under Arizona law.

¶17 In *State v. Jones*, 211 Ariz. 413, ¶ 6, 121 P.3d 1283, 1285 (App. 2005), Division One of this court held that "a defendant's refusal to submit to field sobriety tests can be admitted into evidence in a DUI trial." The court based its holding on the proposition that field sobriety tests, based on reasonable suspicion a DUI offense has been committed, constitute lawful searches. *Id.* "If the search is lawful, then the suspect has no legal right to refuse it or interfere with it." *Id*. Thus, if Barrett reasonably suspected Jolly

committed a DUI offense, evidence of Jolly's refusal to comply was properly admitted. *See id*. ¶ 11.

¶18 Before asking Jolly to perform the field sobriety tests, Barrett observed Jolly driving erratically and noticed that his speech was slurred, his breath smelled of intoxicants, his face was flushed, and he had watery, bloodshot eyes. These observations were more than sufficient to support reasonable suspicion that Jolly was intoxicated. *See id.* ¶ 11 (defendant's erratic driving, bloodshot and watery eyes, slurred speech, and trouble exiting vehicle constituted reasonable suspicion for DUI). Thus, Barrett's request for Jolly to perform field sobriety tests was lawful; the jury could consider Jolly's refusal to comply. There was no error, let alone fundamental error, in the trial court's instruction.

¶19 For the foregoing reasons, we affirm.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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JOSEPH W. HOWARD, Presiding Judge